

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROANNE HOLMAN; NARCISCO NAVARRO  
HERNANDEZ; MIGUEL A. ALVAREZ; and  
all others similarly situated,

Plaintiffs,

v.

EXPERIAN INFORMATION SOLUTIONS,  
INC.,

Defendant.

No. C 11-0180 CW

ORDER DENYING  
DEFENDANT'S MOTION  
FOR SUMMARY  
JUDGMENT AND TO  
DECERTIFY THE  
CLASS  
(Docket No. 186)

Defendant Experian Information Solutions, Inc. has filed a motion for summary judgment and a motion to decertify the class. Plaintiffs Roane Holman, Narcisco Navarro Hernandez and Miguel A. Alvarez oppose the motion and Defendant has filed a reply. Having considered the parties' papers and the entire record in this case, the Court DENIES Defendant's motion for summary judgment and motion to decertify the class. (Docket No. 186).

BACKGROUND

This action arises from Experian's purported disclosure of the credit reports of putative class members to Finex Group, LLC in violation of the Fair Credit Reporting Act (FCRA). Plaintiffs seek statutory damages under the FCRA for Experian's alleged willful violation of the statute by furnishing consumer reports to Finex and failing to verify that Finex was using those reports for a permissible purpose, even though Experian had reason to believe that Finex was not doing so.

I. Experiences of the named Plaintiffs

A. Roane Holman

On August 8, 2009, Holman was driving his Toyota car and was stopped and arrested on suspicion of drunk driving. Holman Decl.

¶ 2. The police had a towing company tow Holman's car from the scene. Id. They did not ask him if he wanted the car towed. Id. Holman was unable to pay the towing company for towing and storage fees for his car. Id. at ¶ 3. The towing company subsequently sold his car in a lien sale. Id. Holman later received bills from Finex seeking to collect the balance owed for towing and storage. Id.

Plaintiffs allege that Experian provided Finex with a consumer report regarding Holman, including his credit information, on September 14, 2009. First Am. Compl. (1AC) ¶ 15. Experian admits that it did. Answer ¶ 15.

B. Narcisco Navarro Hernandez

Navarro formerly owned a LeBaron car. He traded it for a truck, and subsequently completed a form at the DMV to record the transfer of the car. Navarro Depo. Tr. 22:18-23:19, 25:1-5.<sup>1</sup>

Plaintiffs allege that later on, in August 2009, a law enforcement officer directed a towing company to tow the car. 1AC ¶ 8. The towing company sent him a bill, which he did not pay. Id. The company subsequently sold the car at an auction and claimed he was liable for the deficiency. Id. When Navarro failed to pay the deficiency, the towing company retained Finex to

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<sup>1</sup> Although Experian suggests that Navarro in fact did not trade away the car, Experian offers no evidence to contradict Navarro's testimony.

1 collect it. Id. On September 1, 2010, Experian furnished a  
2 consumer information report with his credit information to Finex  
3 for use in collecting the debt. Id. at ¶ 17.

4 C. Miguel A. Alvarez

5 Alvarez formerly owned a 1985 VW Jetta. Alvarez Decl. ¶ 2.  
6 He sold the car on September 11, 2009 and subsequently filed a  
7 Notice of Transfer and Release of Liability with the California  
8 Department of Motor Vehicles. Id.

9 Alvarez subsequently received a bill from a towing company  
10 for towing and storage of the Jetta, which had taken place after  
11 he sold the car. Id. at ¶ 3. Alvarez did not initiate the  
12 towing. Id. He alleges that a law enforcement officer directed  
13 the towing company to tow the car. 1AC ¶ 7.

14 After Alvarez refused to pay the bill, the towing company  
15 sent him a notice, stating that the car had been sold at a lien  
16 sale and asking him to pay the towing deficiency. Alvarez Decl.  
17 ¶ 4. Finex subsequently sent Alvarez bills for towing and  
18 storage. Id.

19 Plaintiffs allege that Experian furnished Finex with a  
20 consumer report regarding Alvarez, including his credit  
21 information, on June 29, 2010. 1AC ¶ 16.

22 II. Appeal in Pintos v. Pacific Creditors Association and  
23 Experian's related actions

24 In Pintos v. Pacific Creditors Association, Case No. C 03  
25 5471 CW (N.D. Cal.), this Court granted summary judgment in favor  
26 of the defendants, Pacific Creditors Association (PCA) and  
27 Experian, concluding that the law permitted Experian to furnish  
28 Maria Pintos's credit report to PCA for the purpose of collecting

1 her towing-related debt. Experian had maintained that this  
2 purpose fell within the scope of 15 U.S.C. § 1681b(a)(3)(A), which  
3 authorizes a consumer reporting agency to furnish a consumer  
4 credit report to a person it has reason to believe "intends to use  
5 the information in connection with a credit transaction involving  
6 the consumer on whom the information is to be furnished and  
7 involving the extension of credit to, or review or collection of  
8 an account of, the consumer." Pintos appealed. While the alleged  
9 events in the current case occurred, proceedings on Pintos's  
10 appeal were ongoing.

11 The Pintos appeal generated two opinions by the Ninth  
12 Circuit. In the first, issued September 21, 2007, the Ninth  
13 Circuit concluded that the Fair and Accurate Credit Transactions  
14 Act of 2003 (FACTA), Pub. L. No. 108-159, 117 Stat. 1952, amended  
15 the FCRA to define "credit" as a "'right . . . to defer payment,'" and, as a result, a "'credit transaction' is a transaction in  
16 which the consumer directly participates and voluntarily seeks  
17 credit." Pintos v. Pac. Creditors Ass'n, 504 F.3d 792, 798 (9th  
18 Cir. 2007) (citing Stergiopoulos v. First Midwest Bancorp, Inc.,  
19 427 F.3d 1043, 1047 (7th Cir. 2005)). It also held that Pacific  
20 Creditors Association's (PCA's) blanket certification to Experian  
21 that it would use the credit reports for permissible purposes did  
22 not absolve Experian of responsibility, because "the reporting  
23 agency must make 'a reasonable effort' to verify the  
24 certifications and may not furnish reports if 'reasonable grounds'  
25 exist to believe that reports will be used impermissibly." Id. at  
26 800 (citing 15 U.S.C. § 1681e(a)).  
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1 In response to this decision, in October 2007, Experian  
2 distributed a "Talk Track" memorandum to its employees outlining  
3 the Ninth Circuit's holding and the company's position regarding  
4 the case, and instructing its employees to use the information in  
5 the memorandum when speaking with collections customers. Henke  
6 Decl. ¶ 4; Anderson Decl., Ex. 7, at 1. In the memorandum,  
7 Experian stated that it was "seeking court review and rehearing of  
8 [the] decision" and would "notify its clients regarding compliance  
9 procedures after the final outcome of the court's review."  
10 Anderson Decl., Ex. 7, at 1. Experian directed its employees to  
11 tell "clients to consult with their company's legal counsel for  
12 guidance in this matter" if the clients asked a question regarding  
13 the Pintos decision. Id.; Henke Depo. Tr. 105:13 106:4.

14 On April 30, 2009, the Ninth Circuit withdrew its first  
15 opinion and issued a superseding decision. The second Pintos  
16 opinion excised the previous references to the FACTA, but reached  
17 the same conclusion: collection of a towing-related debt did not  
18 provide a permissible purpose to obtain or furnish a credit report  
19 where it did not constitute "a transaction initiated by [the  
20 consumer]" and was not a judicially-established debt. Pintos v.  
21 Pac. Creditors Ass'n, 565 F.3d 1106, 1114 (9th Cir. 2009). The  
22 Ninth Circuit did not alter its holding or analysis regarding  
23 Experian's liability for PCA's FCRA violations. Id. at 1114-15.

24 In response to the second decision, Experian distributed a  
25 second Talk Track memorandum to its employees in May 2009. Henke  
26 Decl. ¶ 4; Anderson Decl., Ex. 7, at 2. The memorandum provided  
27 staff with an update regarding the more recent decision, and  
28 included the same description of the company's position as that

1 contained in the previous memorandum. Anderson Decl., Ex. 7, at  
2 2. Experian again stated that it was "seeking court review and  
3 rehearing of [the] decision" and would "notify its clients  
4 regarding compliance procedures after the final outcome of the  
5 court's review." Id. Experian again directed its employees to  
6 tell "clients to consult with their company's legal counsel for  
7 guidance in this matter." Id.

8 Experian petitioned for rehearing en banc, which was denied;  
9 seven circuit judges dissented from the denial. See Pintos v.  
10 Pac. Creditors Ass'n, 605 F.3d 665, 670-72 (9th Cir. 2010).  
11 Following the denial of the petition, on May 21, 2010, the Ninth  
12 Circuit panel amended the second Pintos opinion to clarify what  
13 arguments Experian and PCA could raise on remand to this Court.  
14 Id. at 670. This amendment did not alter the analysis or holding  
15 of the April 2009 opinion. Id.

16 In June 2010, Experian issued a third Talk Track memorandum  
17 to its sales employees describing the recent denial of the motion  
18 for rehearing en banc and the holding of the earlier decisions.  
19 Henke Decl. ¶ 4; Anderson Decl., Ex. 7, at 3. In the memorandum,  
20 Experian stated that it would "notify its clients in the coming  
21 weeks regarding new compliance policies, possibly including  
22 re-certification, updated membership documents, and audits."  
23 Anderson Decl., Ex. 7, at 3. It again stated that it "urges all  
24 clients to consult with their companies' legal counsel for  
25 guidance in this matter." Id.

26 In September or October 2010, Experian mailed a document  
27 titled "Important Notice" to all of its subscribers. Henke Decl.  
28 ¶ 5, Ex. A; Anderson Decl., Ex. 5. In the notice, Experian

1 described the Pintos case and the Ninth Circuit's holding.

2 Experian also stated that

3       Experian will be contacting all pertinent customers to  
4       discuss this issue. We expect to confirm with you that  
5       you are in compliance with this interpretation of the  
6       FCRA. Until then, unless you advise otherwise, we are  
7       relying upon you to comply with your contract with  
8       Experian and this interpretation of the law. This means  
9       that you may obtain Experian reports for collection  
10       purposes only when collecting an obligation arising from  
11       a transaction voluntarily initiated by the consumer or  
12       patient or an obligation that has been judicially  
13       established by a court order or judgment.

14 Anderson Decl., Ex. 5.

15       Experian began a process to have its collections clients  
16       "re-certify their permissible purpose of collections." Anderson  
17       Decl., Ex. 8, at 1. On December 15, 2010, Experian held a  
18       training session for its staff, in which it reviewed the impacted  
19       client accounts and taught staff about an online process that it  
20       created for the re-certification process. Experian provided a  
21       webinar for staff who could not attend the training. Id. at 2.  
22       Experian set July 1, 2011 as the deadline for re-certification of  
23       clients. Id. at 1.

24       On January 10, 2011, the United States Supreme Court denied  
25       Experian's petition for a writ of certiorari. Subsequently, in  
26       January 2011, Experian issued a fourth and final Talk Tracks  
27       memorandum to its staff, describing the case. Henke Decl. ¶ 6;  
28       Anderson Decl., Ex. 7, at 4. Experian also sent a second notice  
29       to its clients, which was largely identical to the first mailed  
30       notice. Henke Decl. ¶ 7, Ex. B.

31 III. Experian's relationship with Finex

32       Paul Price and Antonia Sainz-Blas founded Finex, a collection  
33       agency specializing in collecting towing deficiency claims for

1 towing companies, in late 2007. Price Decl. ¶ 1. Finex began its  
2 collection activities in late 2007 or early 2008. Id. at ¶ 3.

3 Finex began discussing Experian's services with Experian in  
4 late 2007. Blas Decl. ¶ 5. Finex's primary contact at Experian  
5 for the duration of its relationship with Experian was Scot  
6 Levine, an Account Executive. Levine Decl. ¶ 3. On Finex's  
7 applications for services with Experian in December 2007 and  
8 January 2008, Finex described itself as a collection agency and  
9 call center, and listed its permissible purpose for obtaining  
10 credit information as follows: "We are a consumer & commercial 3rd  
11 party collection agency." Anderson Decl. ¶¶ 8-9, Exs. 2 and 3.  
12 During its process of approving Finex to report and receive credit  
13 information, an Experian employee noted that Finex's permissible  
14 purpose was "collections." Anderson Decl., Ex. 11. Experian  
15 employees printed pages from Finex's website that indicated that  
16 Finex provided collections for towing companies and placed these  
17 documents in Experian's file on Finex. Henke Depo. Tr. 49-50,  
18 64:22-66:10, 71-77; Anderson Decl., Ex. 9.

19 Finex entered into a Subscriber Agreement with Experian in  
20 January 2008, under which Finex received Collection Advantage  
21 reports from Experian, which contain credit information taken from  
22 Experian's consumer credit database. Blas Decl. ¶ 5; Levine Decl.  
23 ¶ 3. Finex began receiving these reports in early 2008. Price  
24 Decl. ¶ 20. The Collection Advantage reports contain a "Recovery  
25 Score," which Levine "described as a score that ranks accounts  
26 based on the likelihood the debtors will pay the debt." Price  
27 Decl. ¶ 12.



Price and Blas state that they discussed the Pintos decisions with Levine on multiple occasions and that they told Levine repeatedly, including in their early conversations with him, that "Finex specialized in collecting on towing deficiency claims." Price Decl. ¶¶ 12-13; Blas Decl. ¶¶ 6, 9, 10. During their initial conversation with him, Price and Blas asked him whether in light of Pintos "there was any problem with Finex receiving the Recovery Scores for use in its towing claims collections," to which Levine responded that "there was no problem." Price Decl. ¶ 6. In June 2008, Price and Blas told Levine that "99% of our collections were for towing" and said they "wanted to be sure we were not getting FRCA information we should not be getting in light of Pintos." Id. at ¶ 9. Levine assured them that "Finex was not getting any information it should not be getting for those collections." Id. Also in June 2008, Price sent Levine an email stating that one type of debt that Finex collected was for towing. Anderson Reply Decl. ¶ 2, Ex. 18. Again in October 2008, Levine "assured" Blas that they "were not in violation of the Pintos decision in using the Collection Advantage reports, including the Recovery Scores." Blas Decl. ¶ 10.

Finex's account with Experian was discontinued in late 2010, and Finex last obtained a Recovery Score from Experian on November 19, 2010. Levine Decl. ¶ 2; Price Decl. ¶ 25; Anderson Decl. ¶ 18. At that time, Experian had not yet sent Finex a re-certification request for compliance with the Pintos decision. Henke Decl. ¶¶ 7-8. During the course of their relationship from 2008 to 2010, Experian furnished Finex with Collection Advantage reports on more than 40,000 consumers. Price Decl. ¶ 22.

1 IV. Background of this action

2 Holman initiated this action on January 12, 2011 as the sole  
3 Plaintiff, naming as Defendants Experian and Finex. See Docket  
4 No. 1. Defendant Experian filed a motion to dismiss the  
5 complaint, arguing that, in September 2009, no authority clearly  
6 established that it was impermissible under FCRA to furnish  
7 consumer credit reports for use in the collection of towing-  
8 related debts. Specifically, Experian argued that the use of  
9 credit reports to collect towing-related debts was debatable until  
10 January 2011, when the Supreme Court denied its petition for  
11 certiorari in Pintos.

12 On May 25, 2011, this Court denied Experian's motion to  
13 dismiss the complaint. Docket No. 32. Holman later settled his  
14 claims against Finex and Holman and Experian stipulated that  
15 Plaintiff could file an amended complaint, removing the claims  
16 against Finex and adding Navarro and Alvarez as named Plaintiffs.  
17 Docket Nos. 40, 42, 56. This Court granted the stipulation on  
18 September 16, 2011, dismissing the claims against Finex. Docket  
19 No. 44. Plaintiffs filed their first amended complaint, omitting  
20 the claims against Finex and adding Navarro and Alvarez as named  
21 Plaintiffs, on October 5, 2011. Docket No. 59.

22 On December 1, 2011, Plaintiffs filed their motion for class  
23 certification. To prosecute their single claim for statutory  
24 damages for Experian's willful violation of the FCRA, Plaintiffs  
25 sought certification of a class consisting of "all consumers whose  
26 consumer reports were furnished by Experian to Finex in connection  
27 with Finex's efforts to collect on a towing deficiency claim from  
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1 January 1, 2008 to the present." Mot. at 12. The Court granted  
2 Plaintiffs' motion to certify a class including:

3 all consumers whose consumer reports were furnished by  
4 Experian to Finex from January 12, 2009 to the present  
5 in connection with Finex's efforts to collect on a  
6 towing deficiency claim that was not reduced to a  
7 judgment and was not the result of a transaction that  
8 the consumer initiated.

9 Docket Nos. 138, 146.

#### 10 LEGAL STANDARD

##### 11 I. Summary Judgment

12 Summary judgment is properly granted when no genuine and  
13 disputed issues of material fact remain, and when, viewing the  
14 evidence most favorably to the non-moving party, the movant is  
15 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
16 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
17 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
18 1987).

19 The moving party bears the burden of showing that there is no  
20 material factual dispute. Therefore, the court must regard as  
21 true the opposing party's evidence, if supported by affidavits or  
22 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
23 815 F.2d at 1289. The court must draw all reasonable inferences  
24 in favor of the party against whom summary judgment is sought.  
25 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
26 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
27 F.2d 1551, 1558 (9th Cir. 1991).

28 Material facts which would preclude entry of summary judgment  
are those which, under applicable substantive law, may affect the  
outcome of the case. The substantive law will identify which

1 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
2 242, 248 (1986).

3 II. Motion to Decertify the Class

4 Under Federal Rule of Civil Procedure 23(c)(1)(C), an order  
5 granting class certification may be altered or amended at any time  
6 before judgment. Furthermore, the court may decertify a class if  
7 the requirements for class certification under Rule 23 are not  
8 met. Gonzales v. Arrow Financial Services LLC, 489 F. Supp. 2d  
9 1140, 1153 (S.D. Cal. 2007). The party seeking decertification of  
10 a class bears the burden of demonstrating that the elements of  
11 Rule 23 have not been established. Slaven v. BP America,  
12 Inc., 190 F.R.D. 649, 651 (C.D. Cal. 2000); accord, e.g., Otsuka  
13 v. Polo Ralph Lauren Corp., 2010 WL 366653, at \*4 (N.D. Cal.);  
14 Arrow Financial Services, 489 F. Supp at 1153.

15 DISCUSSION

16 I. Motion for Summary Judgment

17 A. Pintos

18 Defendant first argues that summary judgment is warranted in  
19 its favor because the prohibition on the furnishing of credit  
20 reports to debt collectors seeking to collect debts related to  
21 non-consumer-initiated towing was not "clearly established" before  
22 June 1, 2010 when the Ninth Circuit issued the mandate in Pintos.  
23 As Defendant acknowledges, the Court rejected this argument when  
24 it denied Defendant's motion to dismiss. See Docket No. 32.  
25 However, Defendant argues that the subsequent Supreme Court  
26 decision regarding qualified immunity in Ashcroft v. al-Kidd, 131  
27 S. Ct. 2074 (2011), "warrants" summary judgment on the claims of  
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1 all class members whose claims arose before June 1, 2010. Def.'s  
2 Mot. at 2.

3 As discussed in the Court's order denying Defendant's motion  
4 to dismiss, the FCRA limits the purposes for which consumer  
5 reporting agencies may disclose credit reports. 15 U.S.C.  
6 § 1681b. For willful violations of the statute, prevailing  
7 consumers may recover actual or statutory damages, punitive  
8 damages and reasonable attorneys' fees. 15 U.S.C. § 1681n(a). In  
9 Safeco Insurance Company of America v. Burr, 551 U.S. 47, 57  
10 (2007), the Supreme Court held that a consumer must show that the  
11 defendant violated the FCRA either knowingly or recklessly to  
12 prove a willful violation. However, the Safeco Court made clear  
13 that a defendant's action is considered reckless if it "is not  
14 only a violation under a reasonable reading of the statute's  
15 terms, but shows that the company ran a risk of violating the law  
16 substantially greater than the risk associated with a reading that  
17 was merely careless." Id. at 69.

18 Defendant argues that the Supreme Court "borrows its  
19 standard" for recklessness from the analysis of whether a legal  
20 rule is "clearly established" for purposes of qualified immunity.  
21 Def.'s Mot. at 1. However, Defendant overstates the Safeco  
22 Court's reliance on qualified immunity analysis. Indeed, the  
23 Safeco Court only mentions qualified immunity once, in a  
24 parenthetical to a citation introduced by "Cf." See Safeco, 551  
25 U.S. at 70 (citing Saucier v. Katz, 633 U.S. 194 (2001)). "Cf."  
26 is used to introduce a citation when the "[c]ited authority  
27 supports a proposition different from the main proposition but  
28 sufficiently analogous to lend support. Literally, 'cf.' means

1 'compare.'" The Bluebook: A Uniform System of Citation (Columbia  
2 Law Review Ass'n et al. eds., 19th ed. 2010) at 55.

3 Accordingly, this Court need not revisit its earlier decision  
4 based on an intervening case regarding qualified immunity.  
5 Moreover, the Supreme Court's decision in al-Kidd simply restated  
6 the existing rules with respect to qualified immunity and applied  
7 them to a specific constitutional question. al-Kidd 131 S. Ct. at  
8 2083. The Court DENIES Defendant's motion for summary judgment  
9 with respect to the claims of all class members whose claims arose  
10 before June 1, 2010.

11 B. Plaintiff Holman's Claim

12 Defendant next argues that Plaintiff Holman's individual  
13 claim fails because his decision to drive while intoxicated and to  
14 run from the police when he was pulled over "initiated" the  
15 towing. However, Defendant raised this argument in its opposition  
16 to Plaintiffs' motion to certify the class. The Court has already  
17 addressed and rejected this argument. Defendant does not cite any  
18 intervening legal authority. Accordingly, the Court DENIES  
19 Defendant's motion for summary judgment with respect to Plaintiff  
20 Holman's individual claim.

21 II. Motion to Decertify the Class

22 Defendant next moves for an order decertifying the class.  
23 Defendant argues that since the Court granted Plaintiffs' motion  
24 for class certification, "the class's unmanageability has come  
25 into sharper focus." Def.'s Mot. at 16. This claim of  
26 unmanageability is based on Defendant's position that the only way  
27 to protect its rights under the Seventh Amendment would be to have  
28 each of the class members provide live testimony, subject to

1 cross-examination, regarding their towing debts. Defendant  
2 asserts that such testimony is necessary to ensure that  
3 individuals with consumer-initiated tows are not included in the  
4 class. Therefore, Defendant argues, the class is not  
5 ascertainable, common issues do not predominate and a class action  
6 is not a superior method for resolving class members' claims.  
7 Even assuming that such testimony is required, the Court finds  
8 that Defendant has not met its burden of demonstrating that the  
9 requirements of Rule 23(b) have not been established.<sup>2</sup>

10 A. Ascertainability

11 Defendant asserts as a matter of law that "when individuals  
12 . . . will need to testify in court to prove not only their class  
13 membership but also an element of liability, the class is not  
14 ascertainable." Def.'s Mot. at 18. However, each of the cases  
15 Defendant cites in support of its argument is factually  
16 distinguishable from this case.

17 For example, in Marcus v. BMW of N. Am., LLC, 687 F.3d 583  
18 (3d. Cir. 2012), the district court certified a class of current  
19 and former owners and lessees of used or new BMWs equipped with  
20 certain tires, "whose tires have gone flat and been replaced," in  
21 a case alleging that those tires and the cars equipped with them  
22 were defective. Id. at 592. The Third Circuit reversed, holding,  
23 "Among other problems" the class claims did "not satisfy the  
24 numerosity and predominance requirements." Id. at 588. When

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25 <sup>2</sup> In their opposition to Defendant's motion to decertify,  
26 Plaintiffs argue that they need not prove that each class member's  
27 debt was "not the result of a transaction that the consumer  
28 initiated." However, as discussed below, the limitation is a  
necessary part of the class definition.

1 addressing ascertainability, the Third Circuit noted that the  
2 defendants' records would not identify which purchasers or  
3 lessees' cars had the specific type of tires. Further, the Marcus  
4 court noted problems with the need to attain information about  
5 "whether and why" each potential class members' tires might "have  
6 gone flat and been replaced." Id. at 594. For example, the lead  
7 plaintiff in that case had suffered four flat tires, two of which  
8 his expert agreed would have occurred with any tire. In contrast,  
9 Defendant's records in this case provide the possible universe of  
10 class members, and objective information can establish whether  
11 individuals should be excluded because their tows were consumer-  
12 initiated or they had judicially-established debts.

13 Two of the other cases cited by Defendant also involve  
14 situations in which the defendants did not have records even to  
15 identify the universe of potential class members. See Mann v. TD  
16 Bank, N.A., 2010 WL 4226526 (D.N.J.) (proposed class composed of  
17 individuals who incurred dormancy fees on gift cards where bank  
18 records only indicated who purchased gift cards and not who held  
19 the gift card at the time any fee was assessed); Cumming v. S.C.  
20 Lottery Comm'n, 2008 WL 906705 (D.S.C.) (proposed class of  
21 individuals who purchased scratch-off lottery tickets at certain  
22 times).

23 B. Predominance

24 Defendant next argues that the need for individual testimony  
25 to determine whether individuals had consumer-initiated tows  
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1 overrides any common legal issues.<sup>3</sup> Accordingly, Defendant argues  
2 that the class does not meet Rule 23(b)(3)'s predominance  
3 requirement. Again the cases Defendant cites are distinguishable.

4 For example, in Zinser v. Accufix Research Institute, Inc.,  
5 253 F.3d 1180 (9th Cir. 2001), the Ninth Circuit affirmed the  
6 denial of a motion for class certification in a products liability  
7 case concerning a medical device. The Zinser court acknowledged  
8 that there might be common issues in the case, "such as those  
9 relating to liability to the extent that any alleged defect . . .  
10 may have been caused by [the defendant's] alleged negligence" but  
11 held that "to determine causation and damages . . ., it is  
12 inescapable that many triable individualized issues may be  
13 presented." Id. at 1189. Examples of such issues included  
14 whether the alleged defect was caused by "negligent manufacture  
15 . . . negligent shipping or handling . . . [or] improper handling  
16 [] by physicians or medical staff." Id.

17 In contrast to this multi-faceted, fact-intensive inquiry,  
18 the only individual inquiry in this case is whether the debt  
19 collected was reduced to a judgment or based on a consumer-  
20 initiated tow. The fact that the class is large and the process  
21 could be lengthy does not take away from the limited and discrete

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22 <sup>3</sup> Defendant argues for the first time in its reply brief that  
23 damages are not a common question, suggesting that the Court will  
24 need to make individual inquiries into the actual damages suffered  
25 by each class member to determine the proper amount of statutory  
26 damages to award. The Court is not convinced that such inquiries  
27 will predominate. Moreover, the Court notes that one of the  
28 stated purposes of the FCRA is to insure "a respect for the  
consumer's right to privacy." 15 U.S.C. § 1681. Any improper  
disclosure, no matter the damages suffered, is a violation of the  
consumer's right to privacy.

1 nature of the inquiry. The other cases Defendant cites are  
2 similarly distinguishable. See, e.g., Villa v. United Site Servs.  
3 of Cal., Inc., 2012 WL 5503550 (N.D. Cal.) (denying certification  
4 of class for state meal and rest claims where defendant had no  
5 uniform policy with respect to meal breaks); In re  
6 Phenylpropanolamine (PPA) Prods. Liability, 214 F.R.D. 614 (W.D.  
7 Wash. 2003) (denying certification of a class where individuals  
8 would need to demonstrate that they had purchased and possessed as  
9 of a certain date one of a large number of over-the-counter  
10 medications).

11 C. Superiority

12 Defendant's final argument in support of decertification of  
13 the class is that where, as here, trying the class's claims would  
14 require testimony from many witnesses, a class action is not a  
15 superior method for resolving those claims.<sup>4</sup> However, like the  
16 cases Defendant cites in support of its arguments regarding  
17 ascertainability and predominance, the cases it cites regarding  
18 superiority are distinguishable.

19 For example, in Weigle v. FedEx Ground Package Sys., Inc.,  
20 267 F.R.D. 614 (S.D. Cal. 2010), the district court granted a  
21 motion to decertify four classes of employees who alleged they  
22 were improperly classified as exempt under California law and  
23 denied overtime and meal and rest breaks. The district court  
24 relied on Ninth Circuit case law that held that "the fact that an

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25 <sup>4</sup> To the extent Defendant's argument is based on its  
26 assertion that over 36,000 individuals will have to testify, the  
27 Court notes that the number will likely be much smaller because  
28 only those class members who file a claim will be subject to cross  
examination.

1 employer classifies all or most of a particular class of employees  
2 as exempt does not eliminate the need to make a factual  
3 determination as to whether class members are actually performing  
4 similar duties.'" Id. at 620 (quoting In re Wells Fargo Home  
5 Mortgage Overtime Pay Litig, 571 F.3d 953, 959 (9th Cir. 2009)).  
6 The Weigle court noted evidence that suggested that the amount of  
7 time that employees with the same job title spent on a given non-  
8 exempt task varied from ten percent to seventy-six percent. Id.  
9 at 622. Accordingly, the jury would need to hear testimony  
10 regarding whether each employee "was or was not exempt and  
11 determine to what extent that witness was not provided with  
12 mandated overtime, meal, and rest breaks." Id. at 624-25. This  
13 type of factual inquiry is much more complicated than the  
14 objective inquiry required in this case.

15 Moreover, none of the cases cited by Defendant share the  
16 concern raised in this case that the majority of class members in  
17 this case do not know and are unlikely otherwise to discover that  
18 Defendant sold their information to Finex.<sup>5</sup>

19 Accordingly, the Court DENIES Defendant's motion to decertify  
20 the class.

21 III. Defendant's Request to Modify the Class Definition

22 Finally, Defendant argues that, even if the Court denies its  
23 motion to decertify the class, the Court should amend the class  
24 definition to exclude class members who have declared bankruptcy

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25 <sup>5</sup> In its reply brief, Defendant states that "consumers can  
26 easily see when Experian provides their information to a debt  
27 collector like Finex." Def.'s Reply at 14. However, Defendant  
28 does not cite any evidence or provide any explanation in support  
of this claim.

1 or who have died. Plaintiffs agree that those individuals who  
2 have filed for bankruptcy should be excluded from the class, but  
3 disputes Defendant's argument about class members who have died.

4 "Any person who willfully fails to comply" with the FCRA  
5 "with respect to any consumer is liable to that consumer." 15  
6 U.S.C. § 1681n. Defendant notes that "consumer" is defined as "an  
7 individual" and "person" is defined as an "individual,  
8 partnership, corporation, trust, estate, cooperative, association,  
9 government or governmental subdivision or agency, or other  
10 entity." 15 U.S.C. § 1681a. Because the definition of "person"  
11 lists both "individual" and "estate," Defendant asserts that a  
12 consumer can only be a living person and not the estate of a  
13 deceased person.

14 The Court finds this statutory argument unavailing. As  
15 Defendant points out, a "person" is an entity that can be held  
16 liable under the FCRA, while a "consumer" is one who may have a  
17 cause of action under the statute. 15 U.S.C. §§ 1681a(b)-(c).  
18 "Consumer reporting agency" is defined as "any person . . . which  
19 uses any means or facility of interstate commerce for the purpose  
20 of preparing or furnishing consumer reports." 15 U.S.C.  
21 § 1681a(f).<sup>6</sup>

22 Given the FCRA's broad statutory purpose of "insur[ing] that  
23 consumer reporting agencies exercise their grave responsibilities  
24 with fairness, impartiality, and a respect for the consumer's  
25 right to privacy," it is not surprising that Congress would

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26 <sup>6</sup> "Person" is also used to refer to the entities that request  
27 consumer reports from consumer reporting agencies. See, e.g., 15  
28 U.S.C. § 1681b(3).

1 include a relatively lengthy, non-exclusive list of examples of  
2 entities that can be defined as consumer reporting agencies and  
3 accordingly governed by the statute. 15 U.S.C. § 1681(a)(4).  
4 However, the Court finds that the inclusion of the term "estate"  
5 in that list of entities that can be considered "consumer  
6 reporting agencies" and the exclusion of "estate" from the  
7 definition of those who may bring claims under the FCRA is not  
8 sufficient to override the federal common-law rule that statutory  
9 claims for compensatory damages survive the death of the  
10 plaintiff. See United States v. Oberlin, 718 F.2d 894, 896 (9th  
11 Cir. 1983); In re Schreiber, 110 U.S. 76, 80 (1884).

12 The Court GRANTS Defendant's request to modify the class  
13 definition to exclude those individuals who have declared  
14 bankruptcy and DENIES Defendant's request to modify the class to  
15 exclude those individuals who have died.

#### 16 IV. Plaintiffs' Request to Modify the Class Definition

17 Plaintiffs argue that the class definition should be modified  
18 because they need not prove that each class member's debt was "not  
19 the result of a transaction that the consumer initiated."

20 Plaintiffs note that the FCRA provides that Defendant must have  
21 "reason to believe" that its customers are using credit reports  
22 for permissible purposes before furnishing such reports. See 15  
23 U.S.C. § 1681b(a)(3). Similarly, the FCRA requires consumer  
24 reporting agencies to "maintain reasonable procedures designed  
25 . . . to limit the furnishing of consumer reports to the purposes  
26 listed under § 1681b." 15 U.S.C. § 1681e(a).

27 Plaintiffs argue that Defendant did not have reason to  
28 believe that Finex was using the credit reports for permissible

1 purposes and that Defendant failed to maintain the reasonable  
2 procedures required. Accordingly, Plaintiffs assert that  
3 Defendant should be held liable--for its willful failure to comply  
4 with these sections--to every consumer whose report was sold to  
5 Finex, regardless of whether Finex had a proper purpose with  
6 respect to a given consumer. Plaintiffs assert that limiting  
7 Defendant's liability to those consumers for whom Finex actually  
8 lacked a proper purpose "read[s] into the FCRA a limitation that  
9 Congress did not provide." Opposition at 16.

10 However, § 1681n(a) provides that "any person who willfully  
11 fails to comply with any requirement imposed under this title with  
12 respect to any consumer is liable to that consumer." This  
13 suggests that the inquiry of whether Defendant failed to comply  
14 with the FCRA must be determined on a consumer-by-consumer basis.  
15 Moreover, under Plaintiffs' reading of the statute, even consumers  
16 who have not suffered any injury would be able to bring claims  
17 under the FCRA. Plaintiffs' own complaint alleges, "Experian's  
18 violations of the FCRA caused injury-in-fact to the named  
19 plaintiffs and the other class members by exposing their personal  
20 and confidential information to use and abuse by persons who have  
21 no legal right to obtain or use that information." 1AC ¶ 30.  
22 Plaintiffs have not and cannot argue that Finex lacked a  
23 permissible purpose with respect to those individuals who had  
24 consumer-initiated tows or whose debts had been reduced to  
25 judgment.  
26  
27  
28

CONCLUSION

For the reasons set forth above, the Court DENIES Defendant's motion for summary judgment and to decertify the class. Docket No. 186. The Court AMENDS the class definition to include:

all consumers whose consumer reports were furnished by Experian to Finex from January 12, 2009 to the present in connection Finex's efforts to collect on a towing deficiency claim that was not reduced to a judgment and was not the result of a transaction that the consumer initiated. Individuals who subsequently filed for bankruptcy are excluded from the class.

IT IS SO ORDERED.

Dated: 9/12/2013

  
CLAUDIA WILKEN  
United States District Judge